The International Arbitration Landscape in the United States: Implications for Australian Practitioners

Alan M. Anderson, FCIArb
Alan Anderson Law Firm LLC

Donna Ross
Donna Ross Dispute Resolution

Overview

- The Federal and State Legislative and Judicial Framework
- Key U.S. Arbitration Cases
- Enforcing and Setting Aside International Arbitration Awards in the United States
- Obtaining Evidence in Aid of International Arbitration (28 U.S.C. § 1782)

The Legislative Framework

- The FAA (Federal Federal Arbitration Act) 9 USC Sections 1–307 - Enacted by Congress in 1925, and then codified in 1947.
  - Chapter 1 - Domestic and Maritime 9 USC §§ 1-16
  - Chapter 2 - Implements the New York Convention ("NYC") 9 USC §§ 201-208
  - Chapter 3 -Implements the Panama Convention (Inter-American Convention on International Commercial Arbitration 1975) 9 USC §§ 301-307
- Other Conventions to which the U.S. States is a signatory:
  - ICSID
  - NAFTA (North American Free Trade Agreement)
  - Energy Charter Treaty
- The United States has not adopted the UNCITRAL Model Law

The U.S. is Pro-Arbitration

- The U.S Supreme has set forth fundamental pro-arbitration principles.
- Federal policy favors arbitration and pre-empts or supervenes contrary state law provided that there is an agreement to arbitrate.
  - Validity and scope of the arbitration agreement are therefore important factors.
- Federal policy favors freedom of contract:
  - A written agreement to arbitrate is the main requirement. Moreover, parties may waive the FAA by referring explicitly to state law, agree on procedure and scope of issues.
  - However, if there are mandatory requirements, such as statutory claims, the arbitration agreement should include language that explicitly waives statutory rights under United States law (particularly when applying foreign law).

The FAA - Arbitral Law of the Land

Chapter 2 governs International Arbitration, to the extent there is no conflict with the NYC.

- Section 202: An agreement or award falls under the Convention if it involves a commercial, legal relationship, whether contractual or not; and
  - at least 1 non-US citizen (individual or corporation) or
  - property located abroad, performance or enforcement abroad, reasonable relation with a foreign state.
- Section 206: A court having jurisdiction may compel arbitration within or without the United States and appoint arbitrators.

The FAA - Arbitral Law of the Land

- Section 207: Confirmation of the Award only on grounds in Article V of the NYC.
- Sections 203, 204 and 205: These articles grant original jurisdiction to the federal district courts (203) in general and any court that would have jurisdiction save for the arbitration agreement, or at place of arbitration (204). If a case is brought in State court, the defendant may remove (transfer) it to federal court by statute (205).
- However, Chapter 1 also applies to "to the extent that chapter is not in conflict with this chapter or the Convention" (Section 208).
  - Section 2: Validity
  - Section 3: Stay of parallel proceedings
  - Section 6: Procedure (expedited as by motion)
  - Section 7: Witnesses

State Law – Interplay with the FAA

- Although it is well-settled law that the FAA pre-empts state law *Southland Corp v Keating*, 465 US 1 (1984), provisions of state law may also govern international arbitrations if the FAA is silent, and it is not preempted by and there is no conflict with the FAA.
- Additionally, all fifty states have adopted their own arbitration statutes based on the the UAA/RUAA (Uniform Arbitration Act/Revised Uniform Arbitration Act), which is similar to the Model Law.
- Second Circuit:
  - New York - First arbitration statute in the U.S. Article 75 CPLR
- Eleventh Circuit:
  - Florida – International Arbitration Act
  - Georgia – Arbitration statute based substantially on the Model Law.O.C.G.A. § 9-9-30 et seq.
- Ninth Circuit:
  - California – Law ambiguous on attorney representation, disclosure standards.

Competent Courts

- For domestic motions related to arbitration, the a federal district court must have one of the three bases of jurisdiction:
  - subject matter jurisdiction;
  - diversity jurisdiction; or
  - admiralty.
- For international (NYC) arbitration agreements and awards, the federal courts have subject matter jurisdiction. (§203)

While the majority of domestic and all international arbitrations allow a party to bring a motion before a federal court, nothing precludes a party from going to state court, save a motion to remove to federal court (§205).

Main Arbitral Institutions

- **ICC**: International Court of Arbitration of the International Chamber of Commerce. Appoints arbitrators and administers cases under the ICC Rules.
- **ICDR – AAA**: International Centre for Dispute Resolution. Appoints arbitrators and administers cases under the UNCITRAL Rules.
- **ICSID**: International Centre for Settlement of Investment Disputes may appoint arbitrators for *ad hoc* arbitrations, especially under the UNCITRAL Rules
  - JAMS International. Only has Arbitral Rules
  - CPR: International Institute for Conflict Prevention and Resolution
  - CIArb North America (New York Branch)
- FINRA: Financial Industry Regulatory Authority

Cases: Kompetenz-Kompetenz

- The universally accepted principle that the arbitral tribunal can rule on its own jurisdiction has been enshrined in the U.S. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).
- However, there are several conditions:
  - The parties must 'clearly and unmistakably' agree to delegate this authority to the tribunal. The choice of arbitration rules that encompass this principle constitutes such agreement.
  - In the absence of agreement in this regard, U.S. courts retain jurisdiction to decide whether there is a valid arbitration agreement and whether the dispute falls under the scope of the arbitration agreement.

Cases: Severability

- In *Prima Paint* the Supreme Court first established the concept that an arbitration clause should be considered separately from the underlying contract. *Prima Paint Corp. v. Flood & Conklin Mtg. Co.*, 388 U.S. 395 (1967)

- Only defenses related to the validity of the arbitration agreement (and not what the Court called the *Container Agreement*) may be considered by a court, as opposed to an Arbitral Tribunal

Public Policy

- Courts have applied the underlying congressional intent of the FAA rather than the technical letter with regard to the NYC's strong presumption in favor of arbitration.
- That said, as in other countries, the 'public policy' exception can be used as an additional ground to refuse to compel or enforce arbitration or set aside an award.
- In the U.S., while criminal matters are still non-arbitrable, claims arising under antitrust laws, securities laws, the Carriage of Goods by Sea Act and the Racketeer Influenced and Corrupt Organizations Act can now be arbitrated.

Cases: Public Policy

- In Mitsubishi, the Supreme Court ordered arbitration of an international antitrust dispute, even though most U.S. courts had generally found antitrust claims not to be arbitrable. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 US 614 (1985).
- In *Scherk v. Alberto-Culver* the parties were compelled to arbitrate a fraud claim brought under federal securities laws because the underlying contract was "truly international." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974)

Cases: Manifest Disregard of the Law

- In *Hall Street* the Supreme Court held that "manifest disregard" of the law is not a basis for judicial review and that the FAA contains the exclusive grounds for vacating or modifying an arbitral award. *Hall Street Assocs. LLC v. Mattel, Inc.*, 552 U.S. 576 (2008)
- Nonetheless, U.S. courts still have diverging positions on manifest disregard.
- Even when considered a viable ground, it is 'confined to those exceedingly rare instances of egregious impropriety on the part of the arbitrators'. *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758 (2010)
- A properly reasoned award will help to avoid such cases.

Cases: Motions to Compel or Stay

When one party initiates litigation despite an arbitration agreement, the other party may move to stay litigation and compel arbitration.

Even if some claims are not arbitrable, the arbitrable claims must be sent to arbitration. *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011) (*per curiam*)

- Stay of an action in favor of arbitration in London. J.K. Intern., Pty., Ltd., v. Agriko S.A.S., 2007 WL 485435 (S.D.N.Y. Feb. 13, 2007
- Grant of U.K. defendant's motion to compel arbitration against a U.S. corporation. *R.J. Wilson & Assocs., Ltd. v. Underwriters at Lloyd's London*, 2009 WL 3055292 (E.D.N.Y. Sep. 21, 2009)

Waiver of the right to compel arbitration:

- There is no limitation period to file a motion to compel, but if a party substantially participates in litigation to a point inconsistent with an intent to arbitrate, the motion will be denied if there is prejudice to the other party *La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F.3d 156, 159 (2d Cir. 2010)

Enforcement of Awards

- International arbitration awards are enforced under chapter 2 of the FAA, which incorporates the NY Convention
  - The FAA requires that motions to confirm or enforce an arbitral award must be made within three years from the date of the award – not from the date when any appeals are concluded (§ 207)
  - Grounds for refusing to enforce an international arbitration are those under Article V of the NY Convention apply – not grounds under the FAA

Enforcement of Awards

- The parties may not expand the grounds for review in the arbitration agreement
  - *Hall Street Assocs. LLC v. Mattel, Inc.,* 552 U.S. 576 (2008) ("manifest disregard" of the law is not a basis for judicial review under the FAA; parties may not by agreement confer an expanded scope of review under the FAA)
    - *See Yusuf Ahmed Alghanim & Sons v. Toys R Us*, 126 F.3d 15 (2d Cir. 1997).
    - Compare English Arbitration Act, § 69

Enforcement of Awards

- However, US courts have imposed an additional requirement for confirmation or enforcement that is not in the NY Convention
  - The NY Convention does not waive the US Constitution's due process requirement of personal jurisdiction
    - *E.g., First Investment Corp. of the Marshall Is. v. Fujiajn Mawei Shipbuilding, Ltd.*, 703 F.3d 742 (5th Cir. 2012)
    - Justification is NY Convention Article III: States shall recognize and enforce awards "in accordance with the rules of procedure of the territory where the award is relied upon."

Enforcement of Awards

- Personal jurisdiction may be established by showing that the defendant against whom confirmation/enforcement is sought:
  - Has sufficient minimum contacts with the forum (the place of jurisdiction); or
  - Has assets located within the forum
- Recent US Supreme Court decisions have limited the ability to establish sufficient minimum contacts over foreign parties
  - This is an inadvertent impact, contrary to the general pro-arbitration trend in the US

Enforcement of Awards

- *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (Eliminated the "doing business" test for general, personal jurisdiction, instead requiring evidence the defendant is "at home" in the state)
  - Decision has already impacted enforcement of international arbitral awards:
    - *Sonera Holding v. Çukurova Holding*, 750 F.3d 221 (2nd Cir.), *cert. denied*, 134 S. Ct. 2888 (2014) (reversing district court order enforcing Swiss arbitral award against Turkish corporation)

Enforcement of Awards

- *Quasi in Rem* Jurisdiction:
  - Most US courts have held that the assets in the forum need not relate to the underlying transaction
  - However, two circuit courts (Third and Fourth Circuits) have held that a court may refuse to find jurisdiction based solely on assets in the jurisdiction if those assets do not relate to the underlying action
    - *E.g., Base Metal Trading v. OJSC Novokuznetsky Aluminum Factory*, 283 F.3d 208 (4th Cir. 2002)

Enforcement of Awards

- Other defenses to enforcement include:
  - Sovereign immunity
    - *E.g., First Investment Corp. of the Marshal Is. V. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742 (5th Cir. 2012)
  - Failure to follow agreed procedures
    - *E.g., CEEG (Shanghai) Solar Science & Tech. Co., Ltd. v. Lumos Solar LLC*, D. Colo. 2015)
  - *Forum non conveniens*
    - *E.g., Figueiredo Ferraz e Engenharia de Projeto Ltda. V. Republic of Peru*, 665 F.3d 384 (2nd Cir. 2011)
      - *Justification is again Article III of NY Convention*

28 U.S.C. § 1782

"Assistance to foreign and international tribunals and to litigants before such tribunals"

"(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, … pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person…. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing."

29 U.S.C. § 1782

- Why should you care about § 1782?
  - In case you need evidence for a planned or pending international arbitration proceeding
  - In case the other side in a planned or pending arbitration proceeding files a § 1782 application in the US, either against your client or against a third party
  - In case you need evidence to enforce or defend against an international arbitral award

28 U.S.C. § 1782

- For many years, US courts held § 1782 did not apply to international arbitrations
- *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), indicated "international tribunal" may include international arbitrations
- Since *Intel*, US courts have uniformly held § 1782 applies to investor-state arbitrations

28 U.S.C. § 1782

- Three requirements:
  - The person or entity from whom discovery is sought must reside or be found in the judicial district of the court to which the application is made
  - The request much be made by a foreign or international tribunal or an interested person
  - The evidence requested must be for use in the foreign or international tribunal

28 U.S.C. § 1782

- Since *Intel*, US circuit courts have declined to directly decide whether § 1782 applies to international arbitration proceedings
  - Two circuit courts have dodged the issue but suggested § 1782 applies:
    - *GEA Group AG v. Flex-N-Gate Corp.*, 740 F.3d 411 (7th Cir. 2014)
    - *Consorcio Ecuatoriano de Telecommunicaciones v. JAS Forwarding, Inc.*, 685 F.3d 987 (11th Cir. 2012), vacated, 747 F.3d 1262 (11th Cir. 2014)
  - District courts have split on the issue

Thank You

Further information:

Alan M. Anderson, FCIArb
aanderson@anderson-lawfirm.com
Alan Anderson Law Firm LLC

Donna Ross
donnarosslaw@gmail.com
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